NOTES

WHEN A RAILROAD EMPLOYEE IS HURT: THE LEGAL TANGLE

The calendar year 1914, the last for which complete statistics are available, saw more than 2,500 railroad employees either killed outright or so severely injured that they died within twenty-four hours; while nearly sixty times that number were so injured as not to be able to work for at least three days out of the ten immediately following the accident. Of the accidents giving rise to these injuries, 13,000 were classed as train accidents, in most or all of which damage of some sort was done to the equipment of the road. Damaged engines were hauled into the shops to be repaired, damaged cars likewise, and the cost charged up to operating expenses as a matter of course. But what of the damaged men?

About one-third of a million of the railroad employees of the country are members of organizations that maintain strong insurance funds, from which they may receive benefits in case of disabling injury, without restriction on their right to recover at law from their employers if they so desire; but of the fivefold greater number outside of these unions the vast majority have no other recourse than to the provisions of law. To be sure, some of the most onerous and inequitable features of the common law have been modified, and there are some risks of the employment that a workman cannot assume, even if he knows of them. The outworn doctrine of fellow-service is also considerably restricted in most jurisdictions, as well as that rule by which any negligence of the injured man, however slight, was held to debar him from recovering for the negligence of his employer, however great.

But these things are true in differing degrees in the different states, as well as for different groups of employees in like employments in the same state, and for the same employees under different and rapidly changing circumstances. The engineer of a train running from Philadelphia to New York who is injured while at his work sues, not under the law of the state where he may be at the time of the injury, but under a federal law; while a trackman, employed by the same railroad and injured in his employment, sues under—who can tell? Was he engaged

in interstate commerce? He was operating no train nor any signal, switch, nor other instrumentality to that end; but perhaps he was carrying a sack of bolts to be used in repairing a bridge on which interstate trains customarily run; if so, he may look to the federal law for relief, even though struck by a train that never crosses state boundaries. However, if it is a new bridge, not yet brought into use, or a cut-off to shorten the line and not yet open, he must look to the state law alone.

Or he may be a switch-engine man, hauling now interstate, now intrastate cars; if the injury was incurred in the one instance, it comes under one law, while with exactly the same appliances, over identical tracks, and with the same associates, he may in another five minutes be under another law involving entirely different procedure and amounts of recovery—because the cars being moved have a destination a few miles nearer or farther on. So the questions go to the courts, the parties and their lawyers grasping at the straws of precedents, if happily such may be found; but in the end, as said by the Supreme Court of the United States, "each case must be decided in the light of the particular facts with a view to determining whether, at the time of the injury, the employee is engaged in interstate business."

In other words, the case must be tried before one can be sure under what law recovery should be sought; and it is in no spirit of criticism of the great tribunal that heads our judicial system that it must be said that, despite the value of precedents established by it in its rulings on the federal law (in force only since 1908), the perplexity continues hardly diminished with the passing years, and the local courts incline now to one side and now to the other in the application of the principles and decisions which they undertake to follow. In the meantime, whether the suit is brought under state or federal law, it is a battle of wits and resources, drawn out by appeals, exceptions, motions for new trials, reversals, and rehearings, until months become years, the expected award is eaten up by costs and fees, and a settled spirit of antagonism separates the plaintiff and his witnesses and the employer and his supporters.

Although Congress has had the power to regulate every incident and aspect of interstate commerce from the beginning of our Republic, the common law and state modifications of it, statutory and by interpretation, held unbroken sway in the field of the liability of the railroad employer for injuries to his employees until the year 1906. In this year Congress, after long urging, enacted a liability law which was early found to be defective in that it did not specify the exclusion of employees engaged in intrastate as distinguished from interstate commerce; but

with the difficulties clearly indicated, they were avoided in an enactment of 1908, which, with amendments in 1910, is the law today as to interstate commerce.

But perhaps this last statement cannot be made so broadly. The engineer running from Philadelphia to New York may rise up and testify against us. The Supreme Court has indeed declared of the act of 1908 that by it "Congress has undertaken to cover the subject of the liability of railroad companies to their employees injured while engaged in interstate commerce," and that this law "must supersede all legislation over the same subject by the states." But the courts of New York and New Jersey say that this enactment is paramount and exclusive only within its field, which is that of providing recovery for the consequences of the *negligent* acts of the railroad employer; that there is, however, a new industrial policy in the land, which provides not only for the results of the negligent acts of the employer, but also for the results of that greater number of injurious incidents sometimes called pure accidents or the occupational risk, the burden of which the employee has borne unassisted through all the years. Let these be reckoned as a part of the cost of the undertaking, says the new teaching, and let the burden be distributed among all those benefited by the costly service of these exposed workers, while they and their families, suffering indeed from the physical hurt or the bereavement, shall be in all cases of injury occasioned by the service allowed a measure of compensation, at least for the wage loss. This is the law of workmen's compensation, and in the broad inclusiveness of its policy the courts of New York and New Jersey maintain that they discover an area unrecognized by the federal law, within which the compensation laws of the states may operate alongside the older law. They would make the dictum of the Supreme Court quoted above read, "injured *by the negligence of the companies* while engaged," etc. They therefore offer relief to the interstate employee on their soil, as to all other workmen within the state to whom the law is applicable, under the automatic awards of the compensation law.

Under this construction of the laws, if our engineer is injured while in New Jersey or New York, he has the same remedy for interstate as for intrastate injuries, provided only that the happening is not due to the employer company's negligence. Even so, his problem is hardly simplified, since the fact of the negligence is often no less difficult to determine than is that of the nature of the employment. A New Jersey court, however, neatly offered the defendant company objecting to an

award under the compensation law of the state an uncomfortably sharp horn of a dilemma when it remarked that the plaintiff was seeking to recover merely for the consequences of an accident, and had offered no suggestion of negligence on the part of the employer; so that if the employer wished to claim the benefits of a negligence statute it would devolve upon it to plead its own negligence as the cause of the injury—a privilege that would hardly appeal to the defendant in any case.

But suppose that the injury is received in Pennsylvania. So far as the writer is aware, no decision has been made on this point by a Pennsylvania court; but if it were in Illinois, the claim would be rejected on the ground that the federal law occupies the entire field, having declared the full measure of liability intended by Congress to be assumed by the railroads as employers.

Thirty-two states have compensation laws covering industrial employments with various exceptions and limitations, while in sixteen states and the District of Columbia the old rules of employer's liability control; and even in two of the compensation states, railroad employees are shut out entirely from the scope of the compensation laws, while in all the federal law is exclusive within its recognized field, whatever that may be.

As matters now stand, therefore, when a railroad employee is hurt he is concerned about questions of geography, constitutional law, the doctrine of negligence, the destination of each package in his car if a trainman; or the current and past history of the portion of the right of way on which he is engaged if he is a trackman; the object or intended use of appliances being installed if he is a telegraph lineman or is engaged in installing a block-signal system; the last preceding and next intended use of a car or engine in a repair shop if he is a shop hand—and so on and so on. The hazard of the employment is hardly greater than the mystery of what legal action he should take to recover for injuries received while employed. If the state liability laws co-ordinated badly with the federal law—and indisputably they did—the divergent principles of liability and compensation are still more incompatible; so that with every state that joins the honorable sisterhood of the compensation majority, the federal law becomes so much the more antiquated and intolerable.

The obvious first step would appear to be the enactment of a federal law providing an adequate system of compensation within the field for which Congress may act, since such laws are in force in by far the greater part of the national area. Laws of like spirit and method, contemplating like ends to be gained by compatible methods, would then afford relief

for both interstate and intrastate injuries, removing the sharpness of the contrast between state and federal jurisdictions by fixing a common standard for their burdens and awards.

The next step is less simple and obvious, but is submitted as none the less practical and desirable. A compensation bill now in congressional committee proposes the administration of a federal law by referees who may exercise similar functions under the compensation laws of the states within which they serve. This would allow the making of an award under the proper statute on a hearing before a single official, without delay and without conflict, the referee in each district being versed in both the state and the federal law, and having no concern other than to discover under which the award in a given instance should be made. A central federal commission is to act as a clearing-house and board of appeal in cases held to be under the federal law, while in most of the state laws there are provisions for necessary review.

Another proposal is for the federal government to withdraw entirely from the field of legislation on the subject of liability and compensation, permitting the states to resume the control exercised prior to 1906; and with the great advance in state legislation during the past ten years there is far less to object to in this suggestion than at any earlier date. However, the value of a uniform law operating to standardize the laws of the various states, together with the backwardness of some of the states in legislating on the subject and the inadequacy of the laws enacted by some others, makes against the desirability of such a course of action. Moreover, it would be a new thing under the sun that Congress, having put its hand to the plow, should turn back.

A compromise between the foregoing suggestions is to the effect that Congress should enact that where a state has made adequate provision by means of a compensation law, the operation of the federal law be suspended, thus putting a sort of premium on the enactment of advanced legislation by the states, with the end of enabling them to acquire control of all employees within their borders. The Webb law, which allows the states to enforce their own legislation on the subject of the traffic in intoxicants, is cited as a precedent for this form of legislation by exception. Barring the negative attitude which Congress would assume in enacting such a law, the idea has some features to commend it, though it lacks appeal to those who wish to see an adequate, uniform law in the field of interstate employment. The same objection lies to a proposition embodied in a bill introduced in the present Congress practically authorizing the construction of the law now existing that has been

adopted by the courts of New York and New Jersey, to the effect that as the federal law relates only to liability for negligence, state laws compensating for accidents not caused by negligence may be applicable even to employees in interstate commerce. Indeed, this would go but a little way toward clearing up the situation.

Most drastic and of necessity most difficult to attain is the plan to bring all common carriers, both interstate and intrastate, within the control of Congress. To achieve this end the Constitution must be amended—an uncertain undertaking, and tedious at best, but urgently presented for a variety of reasons, of which the one under present consideration is, perhaps, of minor importance, though certainly contributing its measure of argument for such a step. Such consolidation of control is a glittering goal in the eyes of some who hail it as the solution of vexed problems of rate-fixing and regulatory laws of various sorts in which the states have indulged with great freedom and variety in recent years; but the journey thither will be beset by difficulties intentionally interposed by astute and earnest opponents. In the meantime, the daily hazards of the hundreds of thousands of railroad employees continue to be borne by them under conditions that form a maze of complications as to redress that could easily be immensely simplified, with increased financial benefit to the workers and their families, and without adding any excessive burden to the employers, by the enactment of a compensation law such as has been repeatedly proposed to Congress within the past four or five years.

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